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IN THE

# Supreme Court of the United States

GALE NORTON, Secretary of the Interior, *et al.*,

*Petitioners*,

*v.*

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF OF AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, CENTER FOR BIOLOGICAL DIVERSITY, CALIFORNIA WILDERNESS COALITION, IDAHO CONSERVATION LEAGUE, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, OREGON NATURAL DESERT ASSOCIATION, AND WESTERN LAND EXCHANGE PROJECT IN SUPPORT OF RESPONDENTS

CHARLES E. KOOB
*Counsel of Record*
KYLE A. LONERGAN
BENJAMIN R. DELSON
SIMPSON THACHER
& BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2970

JOHANNA H. WALD
*Of Counsel*
NATURAL RESOURCES
DEFENSE COUNCIL
71 Stevenson St., #1825
San Francisco, CA 94105
(415) 777-0220

*Attorneys for Amici Curiae*

185816

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**Common Acronyms**

| | |
|---|---|
| APA | Administrative Procedure Act |
| BLM | Bureau of Land Management |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| FLPMA | Federal Land Policy and Management Act of 1976 |
| FONSI | Finding Of No Significant Impact |
| IMP | Interim Management Policy and Guidelines for Land Under Wilderness Review |
| LUP | Land Use Plan |
| NEPA | National Environmental Policy Act of 1969 |
| OHV | Off-Highway Vehicle |
| ORV | Off-Road Vehicle |
| RMP | Resource Management Plan |
| SEIS | Supplemental Environmental Impact Statement |
| SUWA | Respondents Southern Utah Wilderness Alliance, *et al.* |
| WSA | Wilderness Study Area |

## INTEREST OF THE AMICI CURIAE

The Natural Resources Defense Council, National Wildlife Federation, Center for Biological Diversity, California Wilderness Coalition, Idaho Conservation League, Minnesota Center for Environmental Advocacy, Northwest Environmental Defense Center, Oregon Natural Desert Association, and Western Land Exchange Project (collectively, "*Amici*") are not-for-profit public interest organizations that, *inter alia*, work to protect the environment and preserve the nation's remaining wilderness.[1] *Amici*'s work includes advocating passage of legislation formally designating wilderness, persuading agencies to adopt regulations and policies protective of wilderness, litigating to prevent illegal degradation of wilderness, and educating and organizing the public to support the protection of wilderness. *Amici* regularly rely on the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, to seek enforcement of environmental laws such as the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq*. *Amici*'s members regularly visit public lands managed by the Bureau of Land Management ("BLM") to recreate and enjoy land "untrammeled by man, where man himself is a visitor who does not remain." Wilderness Act, 16 U.S.C. § 1131(c).

*Amici*, who together have nearly 1.5 million members, submit this brief to provide background information on off-road vehicles ("ORVs") and their environmental effects, and to discuss the structure and purpose of FLPMA and NEPA, especially as they relate to BLM and its regulation of ORVs.

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1. Counsel for the parties have consented to the filing of this *amici curiae* brief, and the letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than *Amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

## INTRODUCTION

FLPMA requires BLM to manage certain public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Yet Petitioners propose a new rule of law under which BLM could allow these potential wilderness areas—a limited natural resource of incalculable value—to be destroyed with impunity. The Tenth Circuit appropriately described Petitioners' proposal as an attempt to create "a 'no-man's-land' of judicial review." *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1230 n.10 (10th Cir. 2002).

At issue is whether a court may compel an administrative agency to perform a mandatory, non-discretionary duty—in this case, BLM's duty to prevent the impairment of potential wilderness areas. Petitioners argue that even if BLM is failing to prevent impairment, no court may compel BLM to do otherwise because (1) a court only may compel that which would be final agency action, and (2) any court order compelling BLM to undertake final agency action to prevent impairment would be an impermissible encroachment on BLM's discretion in deciding how to prevent impairment.

But even assuming that Petitioners' first argument is correct—which it is not—Petitioners' manufactured conflict is illusory, and easily dismantled. If impairment is occurring, a court simply may order the agency to stop such impairment. Petitioners concede that such an order would be appropriate,[2] and given both the record here and BLM's own interpretation of FLPMA, such an order would necessarily entail BLM taking final agency action in the form of restricting or closing areas to ORV use. Similarly, because BLM's own interpretation of

2. *See* Brief for Petitioners ("Pet. Br.") at 12 ("a court may direct an agency *to act* when action is clearly required by law" (emphasis in original)). All citations to Petitioners' brief refer to the pagination in the brief filed with the Court on January 5, 2004, which Petitioners formatted according to Supreme Court Rule 33.2.



FLPMA and the record here require as much, a court may specifically order BLM to decide in a formal document whether to restrict or close roads to ORV use to prevent impairment. Petitioners concede that a court would be ordering final agency action in this instance as well.[3]

Petitioners' proposed rule of law for NEPA is just as untenable as their proposed rule for FLPMA. NEPA obliges federal agencies to consider the environmental impacts of their actions. In defiance of this obligation, BLM has refused to take a "hard look" at evidence that increased ORV use has rendered obsolete certain of its NEPA documents. Trying to defend BLM's intransigence, Petitioners seek to characterize "hard looks" as not subject to compulsion by court order. Yet a "hard look" is precisely the sort of mandatory, ministerial obligation that Petitioners concede is appropriate for a court to order.[4]

The rules of law that Petitioners propose are contrary to the letter and spirit of FLPMA, NEPA, and the APA, and should be rejected. The judgment of the court of appeals should be affirmed.

## BACKGROUND ON ORV IMPACTS

In 1979, the White House Council on Environmental Quality ("CEQ") published a report summarizing the environmental harm caused by ORVs:[5]

> ORVs have damaged every kind of ecosystem found in the United States: sand dunes covered with American beach grass on Cape Cod; pine and cyprus

3. *See* Pet. Br. at 12, 55-56; Brief for Respondents Utah Shared Access Alliance, *et al.*, at 14-15.

4. *See* Pet. Br. at 27.

5. The term "ORVs" refers to motorized vehicles such as motorcycles, minibikes, trail bikes, dune-buggies, three- and four-wheel all-terrain vehicles, and jeeps that are used to navigate over roadless land and primitive throughways.

> woodlands in Florida; hardwood forests in Indiana; prairie grasslands in Montana; chaparral and sagebrush hills in Arizona; alpine meadows in Colorado; conifer forests in Washington; arctic tundra in Alaska. In some cases, the wounds will heal naturally; in others they will not, at least for millennia.
>
> Remnant wild and semiwild areas near urban environments in the West have been particularly hard hit by ORVs.

David Sheridan, Council on Envtl. Quality, *Off-Road Vehicles on Public Land* 7 (1979). In the twenty-five years since CEQ's report was published, ORVs have become more powerful, faster, and capable of intruding even further into the most remote and ecologically pristine wilderness areas.[6] They also have become much more popular,[7] resulting in significant and widespread environmental harm.

The deleterious effects of ORVs are well documented, and are particularly pronounced in desert and shrubland ecosystems, such as the public lands in the State of Utah that are at issue in

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6. *See* David G. Havlick, *No Place Distant: Roads and Motorized Recreation on America's Public Lands* 85 (2002).

7. *See, e.g.*, Jason Tanz, *Making Tracks, Making Enemies*, N.Y. Times, Jan. 2, 2004, at F1 ("[O]ver the last few decades the popularity of off-roading has exploded. According to the Motorcycle Industry Council, a trade organization, sales of off-highway motorcycles increased 146 percent from 1998 to 2002, while Americans bought 847,000 A.T.V.'s in 2002, up from 447,000 four years before."); *see also* U.S. Dep't of Agric., Forest Serv., *National OHV Policy & Implementation Teams: On the Right Trail! Managing Off-Highway Vehicles*, at 2 (Jan. 7, 2004) (describing ORV trend), *available at* http://www.fs.fed.us/r10/tongass/districts/sitka/ohv_policy.htm; U.S. Dep't of Interior, Bureau of Land Mgmt., No. UT-100-3-EA-04, *Environmental Assessment for Ft. Pearce Ridge Trail Designation* at 1 (Mar. 2003) (same); Havlick, *supra* note 6, at 88-90 (same).



this case.[8] Specifically, ORVs cause intense soil disruption and compaction, which reduces moisture infiltration rates, soil porosity and soil permeability, and impedes seed germination and seedling growth.[9] In areas with arid soils, ORVs can damage fragile cryptobiotic crusts that help stabilize the soil, which may take from 40 to 250 years to recover.[10] ORVs are also heavy polluters; it is estimated that ORVs spill tens of millions of gallons of gasoline and oil on public lands in the United States each year.[11]

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8. The studies described here were collected with the help of surveys of the literature published elsewhere. *See* Havlick, *supra* note 6, at 91-105 (citing studies); Conservation Biology Inst., *Importance of Bureau of Land Management Roadless Areas in the Western U.S.A.*, 35-37 (Mar. 2000) (same), *available at* http://www.consbio.org/cbi/pdf/blm/blm_report.pdf. Similar background information was in the record before the district court. *See, e.g.*, Expert Witness Report of Dr. Howard Wilshire at 4-6 (May 31, 2000).

9. *See* Robert H. Webb, *Compaction of Desert Soils by Off-Road Vehicles, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions* 51, 75-76 (Robert H. Webb and Howard G. Wilshire eds., 1983); Howard G. Wilshire, *The Impact of Vehicles on Desert Soil Stabilizers, in* Webb and Wilshire, *supra*, at 31, 45; Kristin H. Berry, *A Review of the Effects of Off-Road Vehicles on Birds and Other Vertebrates, in Management of Western Forests and Grasslands for Nongame Birds*, Forest Serv., U.S. Dep't of Agric., Forest Serv. Gen. Tech. Rep. INT-86 at 451, 459-60 (1980); R.E. Eckert *et al.*, *Impacts of Off-Road Vehicles on Infiltration and Sediment Production of Two Desert Soils*, 32 J. of Range Mgmt. 394, 394 (Sept. 1979); H. G. Wilshire and J. K. Nakata, *Off-Road Vehicle Effects on California's Mojave Desert*, 29 Cal. Geology 123, 129-31 (June 1976); Eric Davidson and Martha Fox, *Effects of Off-Road Motorcycle Activity On Mojave Desert Vegetation and Soil*, 22 Madroño 381, 388-89 (Oct. 1974).

10. *See* Jayne Belnap, *Recovery Rates of Cryptobiotic Crusts: Inoculant Use and Assessment Methods*, 53 Great Basin Naturalist 89, 93-94 (1993).

11. *See* Havlick, *supra* note 6, at 95 & n.44.

The soil damage caused by ORVs results in accelerated and excessive erosion.[12] In California's Mojave Desert, for example, ORVs have eroded hundreds of tons of soil and have led to major losses of animal and plant life; scientists believe the impacted desert areas will take hundreds of years to recover.[13] ORVs also impact vegetation directly by crushing and uprooting plants.[14] Data from the Mojave Desert showed an overall trend toward fewer plants and less coverage per shrub in ORV-disturbed areas than in undisturbed areas.[15] ORVs also significantly alter natural distributions of grass and forb cover leading to an overall reduction of plant diversity.[16]

The number, diversity, and biomass of vertebrates are also reduced by ORV use.[17] Birds are particularly susceptible to ORV disturbance, as the noise of ORVs interferes with nesting and mating. One study reported that even moderate ORV use caused a 50 percent reduction in the number of species of birds breeding in the Mojave Desert.[18] Sites in the Mojave Desert that were heavily used by ORVs also showed the lowest density and

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12. *See* Bern S. Hinkley *et al.*, *Accelerated Water Erosion in ORV-Use Areas*, *in* Webb and Wilshire, *supra* note 9, at 92-93.

13. *See* Wilshire and Nakata, *supra* note 9, at 130-31.

14. *See* Earl W. Lanthrop, *The Effect of Vehicle Use on Desert Vegetation*, *in* Webb and Wilshire, *supra* note 9, at 149, 157.

15. *See* Davidson and Fox, *supra* note 9, at 386.

16. *See* Christopher A. Clampitt, *Effects of Human Disturbances on Prairies and the Regional Endemic* Aster curtus *in Western Washington*, 67 Nw.-Sci. 163, 163 (1993).

17. *See* R. Bruce Bury, Roger A. Luckenbach, and Stephen D. Busack, *Effects of Off-Road Vehicles on Vertebrates in the California Desert*, 8 U.S. Fish and Wildlife Serv. Rep. at 1, 18-19 (1977).

18. *See* Roger A. Luckenbach, *An Analysis of Off-road Vehicle Use on Desert Avifaunas*, 43 Transactions of the N. Am. Wildlife Conf. 157, 158 (1978).



biomass of four species of lizard.[19] In the Imperial Dunes, ORV use caused a 20-fold reduction in the Colorado fringe-toed lizard.[20] Studies indicate that ORVs cause similar damage to frog and threatened tortoise populations, as well as to populations of small and large mammals.[21]

As ORVs have become more popular, BLM has come under increased pressure to allow ORVs to travel unimpeded on BLM lands. But BLM operates under a statutory and regulatory regime that mandates that certain lands with the potential to be designated as wilderness be shielded from degradation. As a result, BLM has a choice: it can either limit ORV use to prevent impairment of the wilderness potential of certain lands; or it can succumb to pressure from ORV users, fail to limit ORV use, and allow impairment to occur. The Respondents, Southern Utah Wilderness Alliance, *et al.* (collectively "SUWA"), merely argue that BLM has not fulfilled its non-discretionary, mandatory duty to do the former.

## SUMMARY OF ARGUMENT

BLM received its first comprehensive mandate from Congress on how to manage the lands under its jurisdiction in FLPMA, which requires BLM to manage certain lands "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). To implement this mandate, BLM promulgated the Interim Management Policy and

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19. *See* Stephen D. Busack and R. Bruce Bury, *Some Effects of Off-Road Vehicles and Sheep Grazing on Lizard Populations in the Mojave Desert*, 6 Biological Conservation 179, 182 (July 1974). *See generally* Bayard H. Brattstrom and Michael C. Bandello, *Effects of Off-Road Vehicle Noise on Desert Vertebrates*, *in* Webb and Wilshire, *supra* note 9, at 167, 167-206.

20. *See* Berry, *supra* note 9, at 457.

21. *See* Matthew L. Brooks, *Benefits of Protective Fencing to Plant and Rodent Communities of the Western Mojave Desert, California*, 19 Envtl. Mgmt. 65, 65-66 (1995); Brattstrom and Bondello, *supra* note 19, at 202; Berry, *supra* note 9, at 457-58.

Guidelines for Land Under Wilderness Review ("IMP"), 44 Fed. Reg. 72,014 (Dec. 12, 1979). The IMP specifically requires BLM to restrict access or close roads to ORVs if ORV use threatens to impair the suitability of certain lands for preservation as wilderness. Beyond its mandates specifically related to wilderness, FLPMA requires that BLM manage all of its lands in accordance with land use plans that it develops with public participation. *See* 43 U.S.C. §§ 1712, 1732(a).

The Petitioners correctly point out that BLM has discretion in deciding exactly how its obligation to prevent impairment is fulfilled, and that the agency has taken some action. But such discretion and any actions taken do not relieve BLM of the absolute obligation to prevent the impairment prohibited by FLPMA. If impairment is occurring in potential wilderness areas, a court may compel BLM to fulfill its duties under Section 706(1) of the APA, 5 U.S.C. § 706(1), including by limiting ORV use as required by the IMP.

BLM also is subject to NEPA, which requires that federal agencies be aware of and consider the effects of their actions upon the environment. In particular, NEPA requires agencies to take a "hard look" at new circumstances or information that arise in the course of undertaking an action, and that might bear on the environmental effects of that action. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989); 40 C.F.R. 1502.9(c). SUWA argues that BLM failed to take a "hard look" at important evidence of increased ORV use on certain parcels of land. The "hard look" that SUWA seeks to compel under Section 706(1) of the APA is a mandatory, non-discretionary duty that is judicially enforceable.



## ARGUMENT

### I. The APA Provides Federal Courts With Subject Matter Jurisdiction Over Respondents' FLPMA Claims

#### A. FLPMA Obligates BLM To Administer Certain Lands "So As Not To Impair The Suitability Of Such Areas For Preservation As Wilderness"

A decades-long effort to systematize BLM's management of public land culminated in 1976 with the enactment of FLPMA,[22] which instructed BLM to manage its lands "on the basis of multiple use and sustained yield," 43 U.S.C. § 1701(a)(7), and in a manner:

> that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. . . .

*id.* § 1701(a)(8). To this end, FLPMA instructed the Secretary of the Interior to "prepare and maintain on a continuing basis an inventory of all [BLM] lands and their resource and other values," 43 U.S.C. § 1711(a), to develop "land use plans which provide by tracts or areas for the use of the public lands," *id.* § 1712(a), and to manage BLM lands "in accordance with the land use plans." *Id.* at § 1732(a).

In addition to this general scheme, FLPMA has the specific goal of providing for the inclusion of qualified BLM lands in the National Wilderness Preservation System, which

22. *See generally* D. Michael Harvey, *Exempt from Public Haunt: The Wilderness Study Provisions of the Federal Land Policy and Management Act*, 16 Idaho L. Rev. 481, 481-99 (1980) (discussing legislative history and purpose of wilderness provisions of FLPMA).

Congress created in 1964 when it enacted the Wilderness Act, 16 U.S.C. § 1131 *et seq*. *See* 43 U.S.C. §§ 1701(a)(8), 1782.[23] In establishing the National Wilderness Preservation System, Congress pronounced:

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas". . . .

16 U.S.C. § 1131(a). Congress next defined the essential characteristics of the "wilderness" to be protected:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily

23. The Report of the House Committee on Interior and Insular Affairs recommended passage of FLPMA due in part to an "[u]rgent need for Congressional direction" with regards to "inclusion of BLM lands in the Wilderness System." H.R. Rep. No 94-1163 at 3 (1976).



> by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

Congress's purpose in protecting wilderness was to preserve something of immeasurable value, which, if lost, could never be retrieved.[24] In an oft-cited letter that in 1960 was sent to legislators working on the Wilderness Act, the novelist and conservationist Wallace Stegner wrote:

> Something will have gone out of us as a people if we ever let the remaining wilderness be destroyed . . . so that never again will Americans be free in their own country from the noise, the exhausts, the stinks of human and automotive waste. And so that never again can we have the chance to see ourselves single, separate, vertical and individual in the world, part of the environment of trees and rocks and soil, brother to the other animals, part of the natural world and competent to belong in it. . . . We need wilderness preserved—as much of it as is still left, and as many kinds—because it was the challenge against which our character as a people was formed. The reminder and the reassurance that it is still there

24. As a former Director of BLM simply stated on the thirty-fifth anniversary of the passage of the Wilderness Act, "Wilderness is a resource which can shrink but not grow." Patrick A. Shea, *Foreword: Symposium: Wilderness Act of 1964: Reflections, Applications, and Predictions*, 76 Denv. U. L. Rev. 331, 331 (1999) (quotation and citation omitted).

> is good for our spiritual health even if we never once in ten years set foot in it. It is good for us when we are young, because of the incomparable sanity it can bring briefly, as vacation and rest, into our insane lives. It is important to us when we are old simply because it is there—important, that is, simply as an idea.

Wallace Stegner, *Wilderness Letter*, *in The Sound of Mountain Water* 145, 146-47 (1997), *available at* http://www.wilderness.org/OurIssues/Wilderness/wildernessletter.cfm.[25]

To achieve its goal of including BLM lands in the National Wilderness Preservation System, Congress instructed the Secretary of the Interior, as part of the ongoing inventory of BLM lands, 43 U.S.C. § 1711(a), to create a list of those lands that might be designated as wilderness areas, *i.e.*, roadless areas

25. Economists have noted "that areas with intact natural environments, protected by official wilderness or park status, have attracted higher levels of economic activity than otherwise comparable areas without intact natural environments." Thomas Michael Power, *"Gifts of Nature" in an Economic World*, *in Return of the Wild: The Future of Our Natural Lands* 55, 56 (Ted Kerasote, ed. 2001) (citing studies). "In other words, counties with higher percentages of wilderness have faster total income, employment, per capita income and population growth rates than counties without wilderness." Paul A. Lorah, *Population Growth, Economic Security, and Cultural Change in Wilderness Counties*, *in Wilderness Science in a Time of Change Conference*, U.S. Dep't of Agric., Forest Serv. No. RMRS-P-15-VOL-2 at 230, 232 (May 1999). In December of 2003, more than one hundred economists signed a letter to the President noting that the loss of roadless public lands "undermines one of the cornerstones of economic strength for communities throughout the West." *A Letter from Economists to President Bush and the Governors of Eleven Western States Regarding the Economic Importance of the West's Natural Environment*, at 4 (Dec. 3, 2003), *available at* http://www.econw.com/pdf/120303letter.pdf. As a notable columnist observed, despite their economic value, "[s]ome assets, such as wilderness areas, cannot survive if unprotected from the morals of the martketplace." George F. Will, *A Word for the Wilderness*, Newsweek, Aug. 19 1982, at 68.



five thousand acres in size or larger that contain wilderness characteristics. *Id.* at § 1782(a). Having completed the initial list, the Secretary was to make recommendations to the President as to which areas were suitable for preservation as wilderness, *id.*, and the President was in turn to make such recommendations to Congress. *Id.* at § 1782(b). Congress would then have the final say as to which areas would be designated as wilderness and thus included in the National Wilderness Preservation System. *Id.* at §§ 1782(b) & (c).

Congress anticipated that a substantial period of time would elapse between the enactment of FLPMA and its ultimate decision on whether to designate a particular area for preservation under the Wilderness Act.[26] In order that its own options not be foreclosed by the press of development and that potential wilderness areas not be lost before it could make its wilderness designations, Congress instructed BLM to maintain the status quo in potential wilderness areas:

> During the period of review of such areas and until Congress has determined otherwise, *the Secretary shall continue to manage such lands* according to his authority under this Act and other applicable law

26. Congress was prescient on this point. In 1980, BLM identified 2.5 million acres of land in Utah as suitable for preservation as wilderness, including the areas at issue in this case. *See* 45 Fed. Reg. 75,602, 75,603 (designating Moquith Mountain, Parunuweap Canyon, Sid's Mountain, and Behind the Rocks as wilderness study areas). BLM has since identified additional lands as suitable, and the Secretary of the Interior and the President have both forwarded their recommendations to Congress. As of the end of 2003, Congress had acted as to some 27,700 acres of land, but had left the ultimate status of more than 3.3 million acres of land in Utah undecided. *See* U.S. Dep't of Interior, Bureau of Land Mgmt., *Utah Wilderness Questions & Answers*, *available at* www.ut.blm.gov/utahwilderness/q&as.htm. *See generally*, H. Michael Anderson & Aliki Moncrief, *America's Unprotected Wilderness*, 76 Denv. U. L. Rev. 413, 425-31 (1999) (discussing history of wilderness designation in Utah).

> *in a manner so as not to impair the suitability of such areas for preservation as wilderness . . . .*

43 U.S.C. § 1782(c) (emphasis added). At present, BLM is charged with preserving more than six hundred potential wilderness areas totaling more than 16 million acres of land in accordance with this mandate. *See* U.S. Dep't of Interior, Bureau of Land Mgmt., No. BLM/BC/ST-03/001+1165, *Public Land Statistics 2002*, at 232 (Apr. 2003).

To guide its actions and those of reviewing courts, BLM has promulgated guidelines interpreting FLPMA's mandate that wilderness suitability not be impaired—the IMP. *See* 44 Fed. Reg. 72,014, 72,014-16.[27] Where FLPMA is ambiguous, courts defer to BLM's interpretation of the statute, as articulated in the IMP. *See, e.g., Sierra Club v. Clark*, 774 F.2d 1406, 1408-09 (10th Cir. 1985) (deferring to IMP); *see also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

**1. The IMP Requires BLM To Take Final Agency Action To Prevent Impairment And Fulfill Its Obligations Under FLPMA**

The IMP is BLM's interpretation of what the "nonimpairment mandate" requires for two categories of land: first, lands for which BLM has not completed the wilderness inventory process that is required by FLPMA; and second, Wilderness Study Areas (or "WSAs"), which are lands that BLM has determined to have wilderness characteristics, but that Congress has not yet decided to designate as wilderness. 44 Fed. Reg. 72,104; *cf.* Revised IMP, Introduction.

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27. BLM promulgated the IMP through notice and comment procedures. *See Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739 n.6 (10th Cir. 1982). As Petitioners point out, the BLM has revised the IMP over time as it has gained more information on the impacts of ORV use. *See* Pet. Br. at 3; U.S. Dep't of Interior, Bureau of Land Mgmt., No. H-8550-1, *Interim Management Policy For Lands Under Wilderness Review* (1995) ("Revised IMP"), *available at* http://www.ut.blm.gov/utahwilderness/imp/imp.htm.



Except for certain "grandfathered" mineral extraction and grazing activities, BLM has declared that an activity on a WSA is in accord with Congress's nonimpairment mandate only "if BLM determines that it meets each of the following criteria, which are referred to as the 'nonimpairment criteria'": (a) the activity must be temporary; (b) any impact caused by the activity must "be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole"; and (c) when the activity and reclamation are over, "the area's wilderness values must not have been degraded so far" as to constrain the Secretary's ability to recommend the area for preservation as wilderness. 44 Fed. Reg. 72,022; *cf.* Revised IMP at I.B.2.

Certain activities "that protect or enhance the land's wilderness values or that provide the minimum necessary facilities for public enjoyment of the wilderness values are considered nonimpairing. For example, trails and sanitary facilities could be built for primitive recreational use." 44 Fed. Reg. 72,018; *cf.* Revised IMP at I.B.4. But the IMP is skeptical about whether even seemingly nondisruptive activity in wilderness lands can meet the nonimpairment criteria:

> It is recognized that many minor impacts of nonimpairing activities could accumulate to a point at which the total impact would impair wilderness suitability either by creating impacts that overall are *noticeable* (i.e. are not substantially unnoticeable) or by degrading the area's wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability or nonsuitability for preservation as wilderness.

44 Fed. Reg. 72,019 (emphasis in original); *cf.* Revised IMP at I.B.5.

The IMP expresses particular concern about the "erosion caused by increased off-road vehicle travel on trails." 44 Fed.

Reg. at 72,024. As to ORV use *off* trails, the Revised IMP states: "Cross-Country vehicle use off boundary roads and existing ways is surface disturbing" and "must be denied." Revised IMP at I.B.3.[28] In other words, BLM must either prevent off-road ORV use from occurring, or risk violating FLPMA. Revised IMP at I.B.2.

The BLM is required to take the following actions if impairment is occurring:

> To prevent such cumulative impacts from impairing wilderness suitability, the BLM will monitor the cumulative impacts of ongoing activities. If those impacts are growing so great that the area's wilderness suitability could be impaired, the BLM will take steps to control that impact by adjusting the conditions of use (such as time, place, and quantity), by prohibiting the expansion of the activity, or, if necessary, by prohibiting the activity altogether on the affected lands.

44 Fed. Reg. 72,019; *cf.* Revised IMP at I.B.5. Thus, if ORV impacts in a WSA "are growing so great that the area's wilderness suitability could be impaired," then BLM must either (i) adjust the "time, place, and quantity" of ORV use, (ii) prohibit the "expansion" of ORV use, or (iii) prohibit ORV use "altogether on the affected lands."

As the District Court found below, SUWA has presented colorable evidence that ORV use is impairing the specific WSAs at issue here. *See S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094 at *5 (D. Utah, Dec. 22, 2000) (SUWA

28. The IMP notes that while "[t]he use of motor vehicles and motorized equipment does not necessarily impair wilderness suitability," 44 Fed. Reg. at 72,020, ORVs may be used off of existing routes only in emergencies or where that use satisfies the nonimpairment criteria. *Id.* at 72,019-21. "Based on past practice, it is expected that ORV events involving cross-country travel (off existing ways and trails) as part of the route would rarely satisfy the nonimpairment criteria." *Id.* at 72,024.



"presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use"). If impairment is occurring, then, under the mandates of FLPMA, BLM *must do whatever is necessary* to prevent impairment, including restricting or closing areas to ORV use. *See* 44 Fed. Reg. 72,023 ("BLM will take all actions necessary to ensure full compliance with the Interim Management Policy."); *cf.* Revised IMP at II.E.

### B. BLM's Failure To Fulfill Its Duties Under FLPMA And The IMP Constitutes Agency Inaction Subject To Review Under Section 706(1)

Proceeding under the APA, SUWA argues that BLM has failed to prevent ORV use from impairing the suitability of four specific WSAs for inclusion in the National Wilderness Preservation System.[29] Specifically, SUWA argues: under FLPMA, BLM has a mandatory, non-discretionary duty to prevent ORV use from impairing the suitability of these four WSAs for designation as wilderness; because ORV use is impairing the wilderness suitability of these four WSAs, BLM is obliged to act; and BLM has failed to act to prevent such impairment. These allegations suffice to establish subject matter jurisdiction under Section 706(1) of the APA.

#### 1. FLPMA And The IMP Identify Mandatory, Non-Discretionary Duties That BLM Must Perform

Petitioners' first argument for reversal is that FLPMA "does not specify what would constitute 'impairment'" and does not "identify any discrete final agency action that BLM is required to take in its management of wilderness study areas." Pet. Br. at 36. It is not clear why these two objections are relevant. Judicial interpretation of FLPMA is not foreclosed by omission in the statutory language of "what would constitute 'impairment.'" *See Chevron*, 467 U.S. at 843 & n.9 ("The judiciary is the final

29. *See* Tenth Cir. Response Br. for Appellees Gale Norton and Bureau of Land Mgmt. at 13; Tenth Cir. Opening Br. for Appellants SUWA, *et al.* at 11.

authority on issues of statutory construction," including when a statute is "silent or ambiguous"). Also, FLPMA is not rendered ineffectual by its failure to identify what Petitioners deem to be "discrete final agency action." The language giving rise to SUWA's claim under Section 706(1) could not be clearer—BLM's non-impairment duty is mandatory and non-discretionary.

Moreover, as shown above, BLM's own interpretation of FLPMA in the form of the IMP not only defines impairment, but also identifies specific final agency action that BLM is required to take to prevent impairment from occurring. Regardless of Petitioners' attempt to ignore the IMP in its brief, BLM must abide by its own interpretation of FLPMA. *See, e.g.*, *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959). Section 706(1) provides jurisdiction for SUWA's claims that BLM has failed to meet FLPMA's mandatory, non-discretionary duty of nonimpairment, and to take the steps (that its own IMP deems) necessary to prevent the impairment (that its own IMP deems as) resulting from ORVs.

### 2. SUWA Seeks To Compel Final Agency Action

Petitioners next argue that dismissal is appropriate because Section 706(1) is only available to compel final agency actions. Pet. Br. at 37-39. Petitioners misconstrue Section 706(1).[30] But even if not, Petitioners' argument fails because the duties SUWA seeks to compel under 706(1) would require the taking of final agency action by BLM.

For example, the district court could simply issue an order for BLM to take final action consistent with the IMP to prevent impairment in a specific WSA. Petitioners concede that such an order would be appropriate under Section 706(1), *see* Pet. Br. at 12, and, given the terms of the IMP and a record demonstrating impairment, such an order would oblige BLM

30. To avoid repetition, *Amici* hereby adopt by reference Respondent SUWA's argument that Section 706(1) is available to compel administrative action that would not be "final" under Section 706(2).



to issue road restrictions and/or closures, which Petitioners concede would constitute final agency action. *See* Pet. Br. at 55. Alternatively, the district court, pursuant to the IMP and a record demonstrating impairment, could issue an order requiring BLM to decide in a formal document whether to restrict or close certain areas to ORV use. Petitioners concede that such an order would result in final agency action, and would provide at least part of the relief sought by SUWA. *See id.*

### 3. The Discretion Provided By FLPMA Does Not Deny A Court Jurisdiction To Compel BLM To Comply With FLPMA's Mandatory, Non-Discretionary Duties

Petitioners argue that, because BLM has some discretion in deciding how to implement FLPMA, Section 706(1) is not available to compel BLM to fulfill its mandatory, non-discretionary duties under the statute. Pet. Br. at 39-41.[31] Petitioners misstate the role that any discretion BLM has under FLPMA should play in a court's review of BLM's action or inaction. While BLM may have discretion in deciding *how* to fulfill the nonimpairment mandate, the agency does not have discretion in deciding *whether* to fulfill that mandate. And it is only the second of these issues—*whether* BLM has prevented wilderness impairment—that is at issue in determining if BLM has "unlawfully withheld or unreasonably delayed" action for the purposes of Section 706(1). If wilderness impairment has occurred, then, *ipso facto*, BLM has unlawfully withheld or unreasonably delayed some action it should have been taking.

31. To support this argument, Petitioners characterize SUWA as seeking to compel "programmatic" relief. Pet. Br. at 39. No matter how often Petitioners repeat "programmatic" in their brief, it does not change the fact that the claims at issue here concern four specific WSAs. Such a challenge to specified parcels is exactly the type of challenge permitted by the APA. *See, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 567-68 (5th Cir. 2000). Petitioners also argue that Section 706(1) is limited to actions in the nature of *mandamus*. Pet. Br. at 39. To avoid repetition, *Amici* adopt SUWA's argument refuting this point.

Any discretion BLM has in deciding how to prevent impairment is relevant only when the court decides what remedy to order—which would be *after* the Court has determined that BLM violated FLPMA by allowing impairment, and *after* the Court has found jurisdiction under Section 706(1).

None of this should come as any surprise to Petitioners, since no statute can possibly spell out exactly what an agency is to do in every situation. Accordingly, courts are well versed in such matters, giving appropriate deference on the merits to an agency's own interpretations of a statute. *See Chevron*, 467 U.S. at 843-44 & n.9; *Norton*, 301 F.3d at 1227-28 ("[W]e must give considerable deference to [BLM's] interpretation of the nonimpairment mandate"; however, such deference does not "immunize the BLM from its clear, nondiscretionary duty" to prevent impairment (citations omitted)).

#### 4. BLM Is Not Immune From Judicial Review Because It Has Taken "Some" Action

Petitioners concede that jurisdiction would be appropriate under Section 706(1) if BLM had taken *no* action to fulfill its duties under FLPMA and the IMP. However, Petitioners contend that because BLM has taken *some* action toward preventing impairment, SUWA may not rely on Section 706(1) to establish jurisdiction. Pet. Br. at 39, 41.[32] This argument misconstrues the law, and would eviscerate the purpose of FLPMA.[33] FLPMA,

32. Petitioners state that "[n]either SUWA nor the court of appeals disputed that BLM is, in fact, taking measures to prevent impairment." Pet. Br. at 39. Regardless of whether this is true, it is also undisputed that Respondents have presented colorable evidence showing that impairment is occurring. *See Babbitt*, 2000 WL 33914094 at *5 (SUWA "presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use").

33. The general rule Petitioners urge the Court to adopt has previously been rejected as untenable. *See Ctr. for Biological Diversity v. Veneman*, 335 F.3d 849, 856-57 (9th Cir. 2003); *Montana Wilderness Ass'n v. United States Forest Serv.*, 314 F.3d 1146, 1151 (9th Cir. 2003).



by its plain terms, requires BLM to *prevent* impairment, not to take some action no matter how trivial or ineffectual. 43 U.S.C. § 1782(c). Moreover, the IMP obliges BLM to restrict or close areas to ORVs if they threaten to impair the wilderness suitability of WSAs. In short, if impairment is occurring, BLM's actions to date are largely, if not entirely, irrelevant.

### C. BLM's Failure To Fulfill Its Duties Under The Land Use Plans Constitutes Agency Inaction Subject To Review Under Section 706(1)

SUWA also argues that BLM has failed to carry out its duties under two land use plans.[34] By the plain terms of FLPMA and the regulations that implement it, these land use plans create obligations that BLM is obliged to fulfill. *See* 43 U.S.C. § 1732(a) ("The Secretary *shall* manage the public lands . . . in accordance with the land use plans") (emphasis added); *see also* 43 C.F.R. 1610.5-3(a). Moreover, as established above, the relief SUWA seeks would be in the form of an order compelling final agency action. *See Norton*, 301 F.3d at 1233-34 & n.15. Thus, according to Petitioners' own terms, jurisdiction under Section 706(1) is appropriate.

### D. The Judgment Of The Tenth Circuit Should Be Affirmed

FLPMA's non-impairment standard is mandatory and non-discretionary; BLM may not choose to allow impairment of WSAs. Nor may BLM choose to violate its land use plans. The Tenth Circuit properly held that the district court has jurisdiction under Section 706(1) to compel BLM to perform its mandatory, non-discretionary duties, including as set out in BLM's own IMP and land use plans.

34. *See* Tenth Cir. Response Br. for Appellees Gale Norton and Bureau of Land Mgmt. at 44-45; Tenth Cir. Opening Br. for Appellants SUWA *et al.* at 15-18.

## II. The APA Provides Federal Courts With Subject Matter Jurisdiction Over Respondents' NEPA Claims

### A. NEPA Imposes Mandatory, Non-Discretionary Duties On BLM

As articulated by Congress, the purpose of NEPA is: "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Congress sought to achieve these substantive goals through procedural means; thus, NEPA created procedural mechanisms to ensure that before reaching a decision, a federal agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated. . . ." *Id.*

NEPA contains certain "action forcing" provisions, which are directives to "all agencies to assure consideration of the environmental impact of their actions in decisionmaking." *Kleppe v. Sierra Club*, 427 U.S. 390, 409 & n.18 (1976) (citation and quotation omitted). Most pertinent here is Section 102(C)(2) of NEPA, which requires agencies to include in every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a "detailed statement" on "the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C).

CEQ, which was created by NEPA, 42 U.S.C. § 4342,[35] has issued regulations governing when and how such

35. After passage of NEPA, President Nixon specifically charged CEQ with promulgating regulations for NEPA's "action forcing" provisions. *See* Exec. Order No. 11514 §3(h), 40 C.F.R. pt. 1500, *reprinted in* 42 U.S.C. § 4321.



environmental impact statements ("EISs") are to be issued. *See* 40 C.F.R. 1501 *et seq*. Except for certain classes of actions and those instances in which the decision to prepare an EIS already has been made, an agency's compliance with Section 102(C)(2) of NEPA begins with an Environmental Assessment, or "EA." 40 C.F.R. 1501.3, 1501.4. An EA is a concise document providing evidence and analysis relating to the environmental impacts of the agency's proposed action. 40 C.F.R. 1508.9. If the agency concludes, based on its EA, that the proposed action will not have a "significant effect on the human environment," then the agency issues a document called a Finding Of No Significant Impact, or "FONSI," which briefly presents the reasons for its decision. 40 C.F.R. 1508.13. Alternatively, if the agency concludes that the proposed action will have a significant impact, it must prepare an EIS. 40 C.F.R. 1501.4.

The purpose of an EIS is "to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal government." 40 C.F.R. 1502.1. Thus, CEQ has provided extensive instructions to agencies regarding the timing, contents, and structure of an EIS. *See* 40 C.F.R. 1502. Moreover, the issuance of an EIS or EA does not mark the end of the procedural duties that NEPA imposes on an agency. CEQ regulations require that "[a]gencies shall prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. 1502.9(c).

This Court discussed the standards governing the issuance of a Supplemental Environmental Impact Statement ("SEIS") in *Marsh*, 490 U.S. 374.[36] In *Marsh*, the Court held that "[i]f there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant

36. Petitioners do not dispute that the standards governing the issuance of a supplemental EA are identical to those governing the issuance of a SEIS.

manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Id.* at 374 (citations and quotations omitted). The Courts of Appeals, including the Tenth Circuit, *Norton*, 301 F.3d at 1238, have interpreted *Marsh* as requiring that:

> In reviewing an agency's decision not to prepare a supplemental EIS, a court must undertake a two-step inquiry. First, the court must determine whether the agency took a hard look at the proffered new information. Second, if the agency did take a hard look, the court must determine whether the agency's decision not to prepare a supplemental EIS was arbitrary and capricious.

*Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) (citing, *inter alia*, *Marsh*, 490 U.S. at 385); *see also Village of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991). *But cf. S. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663 (3d Cir. 1999) (articulating three-part test consistent with the above).

### B. BLM's Failure To Fulfill Its Duties Under NEPA Constitutes Agency Inaction Subject To Review Under Section 706(1)

SUWA's claims under NEPA arise from five EISs and EAs that were issued by BLM, and that study the impacts of ORV use on lands under BLM's management.[37] SUWA alleges that, in the years since these NEPA documents were issued, ORV use has increased dramatically on the lands studied. SUWA argues that BLM has failed to fulfill its mandatory, non-discretionary duty to take a "hard look" at this increased ORV use to determine whether it constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,"

37. *See Norton*, 301 F.3d at 1237 & n.18; *Babbitt*, 2000 WL 33914094 at *8; Tenth Cir. Opening Br. for Appellants SUWA *et al.* at 22-24.



40 C.F.R. 1502.9(c), such that the issuance of supplemental NEPA documents would be required. The District Court, misconstruing SUWA's request for an order compelling a "hard look" to be a request for an order compelling completion of a SEIS, dismissed SUWA's claim. *See Babbitt*, 2000 WL 33914094 at *9. The Tenth Circuit reversed, recognizing that under the circumstances present, the district court could order BLM to take the "hard look" required by NEPA. *See Norton*, 301 F.3d at 1236-40.

Petitioners' argument for reversal of the judgment of the Tenth Circuit is narrow. Petitioners do not dispute that the information regarding ORV use contained in BLM's EAs and EISs is outdated, or that evidence of increased ORV usage constitutes "significant new circumstances or information relevant to environmental concerns." Nor, indeed, could Petitioners make such an argument, since BLM concedes that it never took a "hard look" at this new evidence.[38] Instead, Petitioners argue only that BLM's refusal to take the requisite "hard look" is immune from judicial review.

Petitioners proffer two bases for their proposed rule of law. First, paralleling their FLPMA argument, Petitioners argue that jurisdiction is improper under Section 706(1) of the APA because the "hard look" that SUWA seeks to compel would not constitute "final agency action." Second, Petitioners argue that, because BLM is not currently proposing any new "major federal action" on which evidence of increased ORV use might bear, BLM is relieved of any duties under 40 C.F.R. 1502.9(c). Petitioners cannot so easily defeat the purpose of NEPA.

38. BLM admitted to the district court that, "[u]p to this point, the agency has not made any formal determination as to whether . . . the preparation of a supplemental EIS or EA" is required. *See* Appendix to Tenth Cir. Opening Br. for Appellants SUWA *et al.* at 745.

### 1. BLM's Failure To Take A "Hard Look" Is Reviewable Under Section 706(1) As "Action Unlawfully Withheld Or Unreasonably Delayed"

The APA grants courts jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). SUWA argues that BLM has "unlawfully withheld or unreasonably delayed" taking a "hard look" at evidence of increased ORV use. Petitioners counter by arguing that taking a "hard look" is not "final agency action," and therefore is beyond judicial review under Section 706(1).

Petitioners' argument that a court may not order a "hard look" is contrary to the plain language of the APA. The APA provides that: (i) courts "shall . . . compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1); (ii) "agency action" "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13), 701(b)(2); and (iii) "relief" "includes the whole or a part of an agency . . . taking of other action on the application or petition of, and beneficial to, a person." 5 U.S.C. § 551(11)(C). An order compelling BLM to take a "hard look" would meet all three elements, as it would be an order to (i) "compel agency action," where the "agency action" at issue was (ii) "relief" sought (iii) "on the application or petition of" SUWA. Thus, the District Court may provide the relief that SUWA seeks by compelling BLM to take the "hard look" that has been "unlawfully withheld or unreasonably delayed." *Cf. Sierra Club v. Glickman*, 156 F.3d 606, 612, 617-18 & n.7 (5th Cir. 1998) (finding Section 706(1) an appropriate means to compel USDA to consult with the Fish and Wildlife Service, a procedural requirement of the Endangered Species Act).[39]

39. Moreover, as Petitioners recognize, Section 706(1) provides courts with the ability to compel an agency to respond to a rule-making petition, or to make a determination on an administrative complaint, or

(Cont'd)



This Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), on which Petitioners heavily rely, is not to the contrary. *Bennett* established the following test for assessing whether an agency action is "final" under the APA:

> As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences flow.'

520 U.S. at 177-78.

The *Bennett* test was not applied in the context of agency inaction, nor did *Bennett* hold that an agency action must be "final" for purposes of Section 706(2) in order to be properly compelled under Section 706(1). But even if the only actions that could be compelled under Section 706(1) were actions that were "final" under *Bennett*, a "hard look" would pass muster. First, taking a "hard look" is far from tentative or interlocutory. Once an agency has taken a "hard look" at evidence, it has enough information to evaluate the significance of that evidence; until the agency has taken a "hard look," it does not. The act of taking a "hard look" shifts the agency's focus onto, and advances the agency's knowledge of, environmental issues in an irreversible way, which is the "culmination" that NEPA seeks. Second, legal consequences flow from a "hard look," because a "hard look" subjects BLM

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to act on a permit application. Pet. Br. at 20. None of these orders may be distinguished in any principled way from an order compelling an agency to take a "hard look." Rather, an order to compel BLM to take a hard look merely compels the agency to exercise its discretion without directing the outcome—which Petitioners concede Section 706(1) allows. Pet. Br. at 21.

to the legal obligation to make a non-arbitrary, non-capricious decision about whether or not to issue a SEIS.[40]

Finally, the decision whether to issue a SEIS—*i.e.*, taking a "hard look"—is no mere procedural triviality. The purpose of NEPA is to ensure that important environmental effects "will not be overlooked or underestimated," and to do so by "focusing the agency's attention" on "environmental consequences." *Methow*, 490 U.S. at 349. Judicial review pursuant to Section 706(1) ensures that an agency fulfills this mandatory, non-discretionary duty of NEPA, and understands the environmental impacts of its actions.

### 2. BLM's Failure To Take A "Hard Look" Is Not Excused By An Alleged Absence Of New "Major Federal Action"

Petitioners also are in error when they assert that there is no "major federal action" here that triggers the requirements of 40 C.F.R. 1502.9(c).[41] It is precisely because BLM's actions

40. It is well-established that federal courts "should apply the finality requirement in a 'flexible' and 'pragmatic' way." *Telecomms. Research and Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 75 n.27 (D.C. Cir. 1984) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967)). Accordingly, in the context of agencies administering ongoing plans such as the plans BLM administers here, courts have found that the failure to consider or issue a SEIS is final agency action. *See, e.g., Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555, 559 (9th Cir. 2000) (holding "that the Forest Service's failure to evaluate in a timely manner the need to supplement the original EIS in light of that new information violated NEPA"); *Portland Audubon Soc'y v. Lujan*, 795 F.Supp. 1489, 1504-05 (D. Or. 1992) (holding that BLM's failure to prepare SEIS was final action) *aff'd sub nom. Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993) (affirming this holding explicitly); *see also Wisconsin v. Weinberger*, 745 F.2d 412, 417-24 (7th Cir. 1984) (reviewing, as final agency action, Navy's decision not to issue a SEIS to address new information regarding the environmental effect of an ongoing submarine project).

41. Petitioners note that "[n]either SUWA's NEPA claim nor the court of appeals' ruling allowing that claim to go forward rests on the (Cont'd)



under the land use plans are ongoing that the agency is obliged to consider new information that may render its prior environmental studies obsolete. Indeed, this Court reached the same conclusion in *Marsh*, where changing circumstances during ongoing construction of a dam required the Army Corps of Engineers to take a "hard look." 490 U.S. at 363, 373-74.

Moreover, even accepting *arguendo* Petitioners' flawed contention that ongoing actions under a land use plan do not constitute "major Federal action," the CEQ regulations that define "major Federal action" define it to include failures to act that are reviewable under the APA, such as BLM's admitted failure to take a "hard look" here:

> Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly.[42] *Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts . . . under the Administrative Procedure Act . . . as agency action.*

40 C.F.R. 1508.18. Thus, since BLM's failure to take a "hard look" is reviewable under the APA (as shown above), that same failure constitutes a "major federal action" under NEPA.[43]

(Cont'd)
premise that BLM was proposing any 'major Federal action' for those lands." Pet. Br. 45. Petitioners, however, fail to mention that the reason for this is that BLM did not argue Petitioners' new theory of no "major federal action" to the Tenth Circuit until its petition for rehearing en banc.

42. This sentence refers to the language in NEPA providing that agencies shall include an impact statement in "every recommendation and report on proposals for legislation and *other major federal action significantly affecting the quality of the human environment.*" 42 U.S.C. § 4332(2)(C) (emphasis added).

43. If nothing else, the actions remaining to be taken over the indefinite life of the land use plans constitute "major federal actions significantly affecting the quality of the human environment" sufficient to implicate 42 U.S.C. § 4332(2)(C).

Most importantly, Petitioners' argument is fatally flawed because it violates the spirit of NEPA. Under Petitioners' view, no "major federal action" remains when an agency (such as the BLM) administers a plan (such as the land use plans here) for a potentially indefinite period of time. Thus, under Petitioners' view, even if significant new evidence arises that an agency's ongoing management is based on faulty information, a court cannot review—under *Marsh* or any other standard—the agency's refusal to take a "hard look" at the new information. Congress and CEQ could not have intended a result so contrary to the objectives of NEPA.[44]

### C. The Judgment Of The Tenth Circuit Should Be Affirmed

BLM admittedly has ignored significant new evidence that increased use of ORVs may be rendering its NEPA documents obsolete. Under Section 706(1), BLM may be compelled to take a "hard look" at these new circumstances.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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44. Petitioners also argue that BLM should not be compelled to take a "hard look" because it lacks the resources to do so, and because it plans to take a "hard look" soon. Pet. Br. at 46-47. The Tenth Circuit was properly skeptical of both of these defenses, given their inherent inconsistency. *See Norton*, 301 F.3d at 1239-40. Petitioners further contend that a court may not use Section 706(1) to redirect an agency's use of its resources. But orders compelling acts such as a "hard look" do not improperly rearrange agency resources; if they did, then Petitioners would not concede, as they do, that orders enforcing ministerial duties are appropriate under Section 706(1). Pet. Br. at 21. Finally, Petitioners argue that allowing a court to review the refusal of an agency to take a "hard look" would involve courts too often in the decision making of agencies. Pet. Br. at 47. But federal courts may only compel a "hard look" if it has been delayed "unreasonably," 5 U.S.C. § 706(1), and whether an agency has delayed "unreasonably" turns on several factors, including the extent and significance of the new evidence at issue. Thus, a court could dismiss a complaint that did nothing more than allege the agency's failure to take a "hard look" at an insubstantial piece of new evidence.

Respectfully submitted,

CHARLES E. KOOB
*Counsel of Record*
KYLE A. LONERGAN
BENJAMIN R. DELSON
SIMPSON THACHER
& BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2970

JOHANNA H. WALD
*Of Counsel*
NATURAL RESOURCES
DEFENSE COUNCIL
71 Stevenson St., #1825
San Francisco, CA 94105
(415) 777-0220

*Attorneys for Amici Curiae*